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No. 82-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Like the Court of Appeals' statement, appellees' descriptions of the case are erroneous in constitutionally significant ways because they ignore Initiative 394's history, are unclear about the contract terms allegedly impaired and are misleading about 394's present effect. First, appellees erroneously present their case as if WPPSS had not created a crisis for the State's citizens in 1981. But they *do not dispute*, even if they do not mention, that WPPSS mismanagement was the most significant cause of $20 billion cost-overruns; that neither WPPSS nor BPA had started much needed cost-effectiveness studies of the Projects in 1981 when 394 was passed; that the contractual duty to issue future bonds is not absolute but conditioned on, *inter alia*, cost-effectiveness; and that BPA's "oversight" role and the vague "Prudent Utility Practice" standard of the contracts had not prevented gross WPPSS mismanagement, unprecedented cost-overruns, huge schedule delays, failure to study cost-effectiveness and, according to appellee Morgan, billions "wasted" and a WPPSS construction budget "out of control." J.S. 2-7.

Second, appellees erroneously present their case as if a *substantive* "no" vote has already occurred under 394's voter approval mechanism and as if the Projects are going to be terminated. See, *e.g.*, U.S. Mot. 3, 8, 9, 13, 15. But a vote under 394 has not been scheduled or held. Most importantly, according to uncontradicted testimony from leading bond experts, either a "yes" or a "no" vote in such an election could benefit appellees. J.S. 7. Thus, the Initiative is not an attempt by the citizens to avoid existing debt obligations, terminate any of the Projects or repudiate any other substantive financial obligations. In fact, a vote under 394 cannot mandate such results. Instead, the Initiative establishes an external procedural check on the exercise of WPPSS' discretion in light of

WPPSS' gross abuse of that discretion. The Initiative merely gives voters a voice in the decision about whether they shall shoulder *additional* multi-billion dollar debt after publication of an independent cost-effectiveness study describes the economic assumptions and public policy implications underlying that decision.[1]

ARGUMENT

Like the Court of Appeals' decision, appellees maintain that this case is controlled by *U.S. Trust*. But it is far different. It presents the profound constitutional question of whether the federal judiciary, using the Contract Clause, can substitute its judgment for the decision of the state's citizens, when they acted through the initiative power in a robust, wide-open, year-long election process to gain control of a political subdivision which had gone out of control in dramatic and unforeseen ways and which had created a nationally known financial "fiasco." J.S. n.2. In fact, the Court of Appeals' decision striking down a moderate, procedural response to the crisis created by WPPSS' $20 billion cost-overruns is in direct conflict with this Court's doctrines or presents important, unresolved constitutional questions. See R. Lee, A Lawyer Looks At The Constitution 99 (1981) (major questions on interpretation of the Clause remain after *U.S. Trust*).

(1) *The Express Reservation Doctrine.* In attempting to avoid the force of appellant's argument, J.S. 11-16, that 394 is within the powers expressly reserved to the State under the very statute authorizing WPPSS to issue bonds, RCW § 43.52.3411, and that the Court of Appeals violated this Court's express reservation doctrine, appellees make basic constitutional mistakes. First, they do not analyze the precise, unequivocal language of the provision or show any ambiguity, U.S. Mot. 9-10, and instead

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[1] If any Project is not completed, debt service on outstanding bonds will ultimately be paid by *individual* ratepayers who will be charged higher rates by BPA or utilities participating in the WPPSS Project—and not by a disembodied institution called BPA or WPPSS.

spin out strained interpretations not based on statutory text. Second, they try to mislead this Court by claiming that express reservation clauses are without constitutional limit and could be used to destroy all contractual rights. *Id.* 10. But, although changes made under express reservation clauses are outside Contract Clause strictures, they are subject to Due Process limits. J.S. 11-12. Thus, the State could not use the express reservation in Section 3411 to "lower the [interest] rate for bonds already issued," U.S. Mot. 10, because that would constitute an unlawful "taking." But changing the process for deciding whether to issue additional bonds, as 394 does, would not constitute a taking and, in any event, Due Process issues are not before this Court. Third, the long-standing rule in Contract Clause cases that contracts of state entities are to be construed against plaintiffs is not affected by the United States' flatly erroneous citation of *Murray* v. *Charleston*, 96 U.S. 432 (1878) and *Owensboro* v. *Cumberland Telephone Co.*, 230 U.S. 58 (1913). U.S. Mot. 9, 11. Those cases stand for the proposition that the power of a state to change its mind with respect to contracts must generally be express, *not implied*, so that parties are on notice. J.S. n.16.[2] The *express* reservations of Section 3411 and Section 5(a) of the Project Agreements must thus be construed in favor of the State under the historic rule of *Charles River Bridge* and progeny. *Id.*[3]

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[2] *Owensboro* involved an express reservation to change a city ordinance, but not an express reservation to change contract. The "clear and explicit" language is used by the Court there for the proposition that reservations to change contract must be express, not implied. 230 U.S. at 74-75. Here, § 3411 is expressly part of all contracts.

[3] The discussion of Section 3411 in the motion of Seattle-First and Morgan ("Seafirst Mot." 12-14) is confused and has no weight in the face of Section 3411's unambiguous express reservation ("laws hereafter in effect . . . shall apply . . . without limitation . . . to . . . covenants . . . and the effect thereof . . . and the issuance [and] sale of . . . bonds . . ."). This express reservation in the fourth sentence of 3411 clearly qualifies the power of the board

BPA and the bondholders entered into the contracts with WPPSS on clear notice through Section 3411 that WPPSS' authority to issue bonds was subject to subsequent changes in State law. The *"provided, however"* express reservation in Section 5(a) of the Project Agreements shows this BPA awareness, J.S. 14, and the United States admits as much since it concedes that Section 3411 "subjects WPPSS" to *"all* relevant present and future conditions governing the issuance of revenue bonds." U.S. Mot. 9 (emphasis added). The Initiative's procedural requirements for future bond issuance constitute just such conditions.

(2) *The Reserved Powers Doctrine.* In attempting to avoid the force of appellant's argument that 394 is within this Court's Reserved Powers Doctrine, that it is thus outside the strictures of the Contract Clause and that the Court of Appeals committed fundamental constitutional error in ignoring the Doctrine, J.S. 16-18, appellees once again make basic constitutional mistakes. First, they erroneously suggest that there are no constitutional limits on the sovereign Reserved Power to change the structure of governance and that power could destroy all contract rights. U.S. Mot. 11-12, n.13. But, as this Court has made clear, a change in contract protected from Contract Clause scrutiny by the Reserved Powers Doctrine is nonetheless subject to Due Process limits. J.S. n.17. Second, in an improper attempt to bring this case under *U.S. Trust*, appellees argue that the Initiative has imposed *substantive* financial limitations on WPPSS' contracts. For example, the United States talks vaguely about avoiding "financial undertakings that have proved . . . burdensome . . . ." U.S. Mot. 12. But, at present, 394 has only added procedural requirements to the decisionmaking process surrounding bond issuance. *No financial undertakings have been avoided.* The Initiative is thus squarely within the State's Reserved Power to change the structure

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found in 3411's second sentence to issue bonds when it shall deem it advisable. *Cf.* U.S. Mot. 10; Seafirst Mot. 12.

of governance of a political subdivision for future decisions—a power which is still valid under the longstanding holdings of this Court.[4] Summary reversal or plenary review to correct major constitutional error is thus required.

(3) *The "Substantial" Impairment Requirement.* Appellees also do not effectively rebut appellant's contention that the Court of Appeals failed to apply two legal standards for resolving the constitutional issue of substantial impairment established by recent decisions of this Court. First, under *U.S. Trust* and *Spannaus*, a challenged state law must be a "but for" cause of a substantial" modification to an "important" contractual term. J.S. 19. The United States does not dispute that this is an appropriate constitutional standard. Nor does it state that the Court of Appeals followed it. U.S. Mot. 12-15. The Court of Appeals simply did not hold, as it had to, that "mere existence" of the Initiative was a "but for" cause of a "substantial" modification of WPPSS' ability to issue bonds, especially since it was uncontradicted fact that WPPSS could have complied with the Initiative's procedural requirements in the fall of 1982, J.S. n.19, long

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[4] Appellees mistakenly rely on *Shapleigh* v. *City of San Angelo*, 167 U.S. 646 (1897), for the proposition that the Reserved Power to change the structure of governance of political subdivisions is without limits, U.S. Mot. n.13, and that 394 constitutes a change in substantive financial obligations. Seafirst Mot. 15. But *Shapleigh* involved only the attempted repudiation of *vested rights* by putting the right of San Angelo bondholders to receive debt service on *existing* bonds to a vote. Such a repudiation would violate the Due Process Clause and no such repudiation could be attempted here. In fact, the *Shapleigh* Court expressly noted that, unless it tried to avoid *existing* debt, the "State's plenary power over its municipal corporations to change their organization . . . [or] modify their method of internal government . . . is not restricted by contracts . . . with its creditors . . .". *Id.* at 654. Reliance on the Prudent Utility Practice standard is inappropriate here, Seafirst Mot. 16, because the District Court made *no* findings on this contested issue of fact, J.S. 28-30, and because PUP had proven ineffectual in preventing WPPSS' abuse of discretion and the crisis caused by $20 billion cost-overruns. See p. 1, *supra*.

before it stated it would need to return to the bond market for additional construction funds for Projects 2-3.[5]

Second, under *Spannaus* and *Energy Reserves*, a state law must also substantially upset the legitimate expectations of the contracting parties, including the expectations the contracting parties had if circumstances changed dramatically. J.S. 18-20. Again, the United States does not dispute that this is the appropriate constitutional standard after *Energy Reserves*. U.S. Mot. 14-15. Nor does it state that the Court of Appeals followed this standard and analyzed (a) whether the parties had any expectation when they entered into the contracts that there would be massive cost-overruns, gross WPPSS mismanagement, failure of BPA to control WPPSS mismanagement and lack of WPPSS cost-effectiveness studies or (b) whether these expectations, if any, were "reasonable" and were "substantially" upset by 394's external procedural requirements in light of WPPSS' abuse of discretion. Since BPA and the bondholders could not "reasonably" expect that the State would not impose external procedural checks on WPPSS after its abuse of the public

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[5] Rather than arguing that there has been substantial impairment of a contractual duty—the duty to issue bonds—the United States improperly lists some "harms" that were not found by the District Court. U.S. Mot. 13-14. (i) It again raises the spectre of termination—which has not remotely occurred. (ii) It raises the spectre of delay, and attendant cost, although no such findings were entered by the District Court or considered by the Court of Appeals and although the United States knows full well that WPPSS could have complied with 394 months ago before it needed funds and that it cannot go to the bond market now due to a host of other pending cases affecting the Projects. See Lempert, "Retreat From Nuclear Plants Fertilizes Seeds of Litigation," Legal Times, p. 1 (March 7, 1983). (iii) It raises injury to bondholders' security and market value, although the Court of Appeals did not rely on these "harms," and the District Court did not find them with appropriate specificity given the sharp factual dispute on these issues. See J.S. 28-30; Committee Brief in 9th Cir. 22-24. Reliance on the Prudent Utility Practice "standard" is subject to the same Rule 52 defects. U.S. Mot. 15; Seafirst Mot. 6. See J.S. 28-30: note 4, *supra*.

trust, this case should be summarily reversed or vacated and remanded under *Energy Reserves.*[6]

(4) *The Reasonable and Necessary Test.* Probable jurisdiction should be noted in this case because the Court of Appeals demonstrably misapplied the Contract Clause's ultimate "reasonable and necessary" test and because important, unresolved questions relating to application of the test are presented. Appellees' arguments only underscore the need for plenary review.

First, whether the strict or deferential application of the "reasonable and necessary" test should apply to state impairments of the contracts of an independent political subdivision that has gone out of control is a fundamental, unresolved question of constitutional law in the wake of *U.S. Trust* and *Energy Reserves.* J.S. 21-22. The contracts at issue here are expressly those of WPPSS and not of the State. As a municipal corporation, WPPSS has vast delegated power and is not—and never has been—subject to any direct executive control by officials elected at State-wide elections. As the United States admits, *U.S. Trust* is a much different case because it involved impairment of a covenant enacted by the State legislature, not contracts entered into by a political subdivision. U.S. Mot. 17. Most importantly, the two-tiered "reasonable and necessary" test was not clearly articulated by this

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[6] The United States is thus driven to treat this case erroneously as one involving "termination," U.S. Mot. 14-15, and to draw spurious factual distinctions. But *Energy Reserves'* holding of no substantial impairment is based on facts closely analogous to those presented here because unforeseen events with huge financial consequences for consumers/ratepayers occurred (deregulation of natural gas and WPPSS' mismanagement) and the parties were warned by express reservation clauses (a general one in *Energy Reserves* and a specific one here on the very subject—bond issuance—affected by State law changes). WPPSS mismanagement was a "contingency the contract had not provided for," to use the words of the United States. U.S. Mot. 15. And 394 has a less severe impact than the law in *Energy Reserves* because it only imposes procedural requirements and does not substantively affect amounts owing under contract.

Court when many of the cases cited by appellees, U.S. Mot. 16-17, were decided either in the 1930s or the 19th Century—and those cases were materially different than this one since they involved uncompensated "takings" of "vested" property rights that would have been invalid under either the Due Process or the Contract Clauses. *In sum, resolving the issue of whether state impairment of a political subdivision's contracts triggers the strict or deferential application of the "reasonable and necessary" test —or whether different types of impairment, i.e., changes in procedures, changes in substantive financial obligations, or outright, uncompensated takings trigger different applications of the test to the contracts of a political subdivision—is critical to the modern interpretation of the Contract Clause.* See *Spannaus*, 438 U.S. at 244-245 (severity of impairment determines degree of justification state must offer).

Second, the Court of Appeals manifestly misapplied the "reasonableness" in light of the circumstances test, J.S. 23-25, and the United States makes only a limp attempt to defend the decision below. U.S. Mot. 18-19. (a) It is absurd to argue that the problems of gross WPPSS' mismanagement and lack of cost-effectiveness studies were foreseen by the parties to the contracts, U.S. Mot. 19, especially when, as noted, J.S. 24, there is no evidence in the record, none cited by appellees and none found by the courts below that *the contracting parties* had any foreknowledge of the problems, or the type of problems, that gave rise to the Initiative. (b) It is similarly absurd to argue that the Initiative was "narrowly targeted" since 394 deals with broad, generalized problems, *Spannaus*, 438 U.S. at 250, that were created by WPPSS' mismanagement and that affected every citizen in the State. The appellees cannot blink away the Court of Appeals' fundamental misapplication of *all* the *Blaisdell-Spannaus* criteria that are at the historic core of Contract Clause adjudication. See J.S. 25.

Third, the Court of Appeals patently distorted the goals of the Initiative—goals which the United States has con-

ceded below—in misapplying the "necessary" test and substituting its judgment for the judgment of the voters. J.S. 25-28. In this Court, the United States abandons the Court of Appeals' opinion and tries to argue lack of necessity with respect to the goals the United States has conceded below. U.S. Mot. 20-21; J.S. 25-28. In so doing, it implicitly admits that the Court of Appeals did indeed demonstrably misapply the necessity test. In its discussion here, aside from offering naked policy speculation about "necessary" measures, the United States makes further crucial concessions. With respect to the first goal of 394, J.S. 26, it states that "It is true that a referendum is the only way to accomplish 'citizen review' . . .", U.S. Mot. 20, and is thus necessary to achieve that goal. Moreover, with respect to another goal of the Initiative—to require WPPSS to live within stated budgets—it simply discusses no specific alternatives less drastic than 394. *Id.*[7] In any event, if the United States' abandonment of the Court of Appeals' decision and its concessions in its motion are not sufficient to justify summary reversal, then plenary review should be granted to consider application of the necessity test in light of the actual goals of 394 conceded by the United States, rather than the distorted goals improperly used by the Court of Appeals in its willful disregard of 394's uncontradicted legislative history.

(5) *The Rule 52 Violation.* Appellees try to avoid reversal on the textbook violation of Rule 52, J.S. 28-30, by claiming that this case was "largely submitted on stipulated facts and exhibits." U.S. Mot. n.18. But the Pretrial Order clearly stated that the "parties agree that this pretrial order does not cover all areas of relevant fact." CR 170, ¶ 105. Moreover, the stipulated facts were merely a pro forma description of WPPSS, BPA and

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[7] The initiative power of the State is equal to or *higher than* the legislative power, and a failure of the legislature to act, U.S. Mot. 20, is thus evidence of necessity, not lack of necessity. Wash. Const., Art II, § 1(A); Trautman, Initiative and Referendum in Washington: A Survey, 49 Wash. L. Rev. 55, 66 (1973).

Projects 1-5 and did not address (and have not been shown by appellees to have addressed) such disputed factual issues as the meaning, if any, of the "PUP" standard or the legitimate expectations of parties. In addition to 80 pages of proposed findings of appellants below, appellees together filed nearly 50 pages. All were ignored by the District Court.[8]

(6) *Standing.* As an organization that drafted, and led the campaign for, an *initiative measure* and then intervened as a *party*, F.R. Civ. P. 24, and participated extensively below, appellant has standing to have its case heard by this Court on the merits. None of the cases cited by appellees hold to the contrary.[9]

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[8] Appellees' implication that appellant waived any right to specific findings after appellants below filed extensive proposed findings and after the District Court's summary, two day treatment of a complex case, J.S. 8, is simply wrong. U.S. Mot. n.18. The duty to make specific findings is the District Court's and cannot be waived by the parties. Rule 52(a), F.R. Civ. P. ("requests for findings are not necessary for purposes of review"); Wright & Miller, 9 Federal Practice & Procedure (1971), § 2574.

[9] The Committee intervened, in part, because its interests would not be adequately represented by the named State defendants, one of whom (the Governor) opposed passage of 394 and one of whom (the Attorney General) recently made a political decision not to appeal. Moreover, the purpose of the initiative power is to allow citizens to act when the political establishment of the State has failed to lead—as has occurred in the WPPSS' crisis.

CONCLUSION

For the reasons stated above, this Court should either summarily reverse the decision of the Court of Appeals, vacate and remand for reconsideration in light of *Energy Reserves* or note probable jurisdiction.

Respectfully submitted,

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